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No. 88-32

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the ERISA preemption provision bars a state from prosecuting an employer who fails to pay an employee for unused vacation time owed pursuant to the employer's agreement to make such payments out of the employer's general assets.

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OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 402 Mass. 287, 522 N.E.2d 409 (1988), and is reproduced in Appendix A to the Petition for a Writ of Certiorari.

JURISDICTION

The opinion and order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on May 5, 1988. This Court has jurisdiction under 28 U.S.C. §1257(3) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461 (1982), provides in pertinent part:

> For purposes of this subchapter:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital

> care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 1135 of ERISA provides:

> Subject to subchapter II of this chapter and section 1029 of this title, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).

Section 1144(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 1144(b)(4) of ERISA provides:

> Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Section 1144(c) defines certain terms used in section 1144 of ERISA:

> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

The applicable United States Department of Labor regulation, codified at 29 C.F.R. §2510.3-1(b) (1987), provides:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include - . . .
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example -
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons.

Mass. Gen. L. ch. 149, §148 (1986) provides, in pertinent part:

> Every person having employees in his service shall pay weekly each such employee the wages earned by him . . . and any employee discharged from such employment shall be paid in full on the day of his discharge. . . . The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.

> The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. . . . .
>
> Whoever violates this section shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in a house of correction for not more than two months, or both.1/

STATEMENT OF THE CASE

On May 29, 1986, two criminal complaints were issued in the Boston Municipal Court charging Richard N. Morash ("Morash"), president of the

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1/ In 1987, after the complaints against Morash were filed, Massachusetts amended the last sentence of the statute as follows: "Whoever violates this section shall be punished by a fine of not less than five hundred nor more than three thousand dollars or by imprisonment in a house of correction for not more than two months, or both." Mass. Gen. L. ch. 149, §148 (Supp. 1987).

Yankee Bank for Finance and Savings, F.S.B., formerly known as Home Savings Bank, F.S.B., with failing to pay vacation wages to two former employees of the Bank, in violation of Mass. Gen. L. ch. 149, §148 (1986). Joint Appendix 1, 3-6 [hereinafter "J.A. (page)"].

On June 12, 1986, Morash pleaded not guilty. J.A. 1. On November 4, 1986, Morash filed a motion to dismiss. J.A. 1, 7-13. After a November 10, 1986 court hearing, the motion judge took the motion under advisement. J.A. 1.

On January 7, 1987, the motion judge reported a question of law to the Massachusetts Appeals Court pursuant to Mass. R. Crim. P. 34, 378 Mass. 842, 905-906 (1979). J.A. 1, 14-15.2/

2/ Under Mass. R. Crim. P. 34, a trial judge may report an important or doubtful question of law to the Massachusetts Appeals Court for decision.

The judge's report was as follows:

> The Commonwealth contends that the defendant in this case violated G.L. c. 149 §148 by failing to compensate the complainants, two former employees, for vacation time that they accrued but did not use. The defendant has filed a motion to dismiss, alleging that the Commonwealth cannot prosecute under this section because it is preempted by federal law. This motion raises an important question of law that, in my judgment, requires a decision from this Court. Therefore, I report the following question of law pursuant to Mass. R. Crim. P. 34:
>
> > Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. (ERISA), preclude prosecution of an employer who has allegedly violated c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement.

The parties prepared a stipulation of facts which was reported along with the question. J.A. 1, 16-21. The stipulation of facts was as follows:

The defendant in these cases, Richard N. Morash, ("Mr. Morash"), is the president of The Yankee Bank for Finance and Savings, F.S.B., formerly known as Home Savings Bank, F.S.B. (the "Bank"). In May, 1984 the Yankee Companies, Inc. acquired the stock of Home Savings Bank, F.S.B. Home Savings Bank had been in serious financial trouble and was threatened with a regulatory merger.

On May 29, 1986 Messrs. Christopher C. Winslow and William R. Tuttle ("the complainants"), each a former vice-president of the Bank, applied for and were granted criminal complaints in the Boston Municipal Court. Mr. Winslow alleged that the Bank discharged him on May 24, 1985, and that it owes him $14,520 for 66 unused vacation days. Mr. Tuttle alleged that the Bank discharged him on April 19, 1985, and that it owes him $11,146.38 for 42 unused vacation days. The Commonwealth contends that the Bank violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants for vacation time they accrued but did not use.

The Commonwealth, through the Department of Labor and Industries (the "DLI"), is prosecuting these criminal complaints. The DLI and Mr. Morash agree that the following elements of the DLI's prima facie case are undisputed: (1) that the complainants were employed by the

Bank, (2) that the Bank terminated the complainants' employment relationships with the Bank and (3) that the Bank did not offer to pay the complainants the amount of vacation time that they claim they are owed (although it did offer to pay them for vacation time that they accrued after January 1, 1985).

The Question in these cases arises from Section 148's provision that where there is an oral or written agreement to compensate employees for vacation time, vacation pay constitutes wages. For the purposes of this Question only, it is agreed that the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time. Also for the purposes of this Question only, it is agreed that such agreements stem from handbooks, manuals, memoranda and practices. It is further agreed that when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets.

On November 3, 1986 Mr. Morash moved to dismiss both complaints on the grounds that, in order for the DLI to prove a violation of Section 148, it must prove the existence of an oral or written agreement or policy to compensate employees for all unused vacation time. The defendant's contention is that proof

> of such an agreement or policy would constitute proof of a welfare benefit plan, which would fall within ERISA's exclusive jurisdiction. J.A. 16-21.

On January 15, 1987, the case was docketed in the Massachusetts Appeals Court. J.A. 1. On April 16, 1987, the Massachusetts Supreme Judicial Court, on its own initiative, accepted the case for direct appellate review, and, on April 24, 1987, it was docketed in the Supreme Judicial Court. J.A. 1; Mass. R. App. P. 11, 378 Mass. 924, 938-939 (1979).

On May 5, 1988, the Massachusetts Supreme Judicial Court answered the reported question as follows:

> Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is preempted if the payments were to be made pursuant to an "employee benefit plan." Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

Commonwealth v. Morash, 402 Mass. 287, 289, 297-298, 522 N.E.2d 409, 411, 416 (1988). The Supreme Judicial Court's decision terminated the prosecution of Morash. 402 Mass. at 298, 522 N.E.2d at 416.

SUMMARY OF ARGUMENT

I. ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans. One section of the statute provides that state laws that both relate to and purport to regulate an employee benefit plan are preempted. 29 U.S.C. §1144. By definition, only ERISA plans are preempted. 29 U.S.C. §1144.

Mass. Gen. L. ch. 149, §148 (1982) makes it a crime for any person to fail to pay wages, including vacation pay,

owed to an employee. The Bank, in the instant case, agreed to pay its employees for earned but unused vacation time. J.A. 19. The Bank's agreement is not a plan within the meaning of ERISA. Hence, the Massachusetts statute is not preempted.

The Bank's policy here, like the statute at issue in Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211 (1987), has none of the characteristics of a plan. There is no evidence in this case of any administrative scheme; the payments themselves come from the Bank's general assets. J.A. 20. The Bank need only compute the number of unused vacation days and pay its employees. In short, no plan is created.

This conclusion is supported by a United States Department of Labor regulation, which states that "payroll

practices," such as payment of compensation out of an employer's general assets while an employee is on vacation, do not constitute employee benefit plans. 29 C.F.R. §2510.3-1(b). Since the Bank's policy is to give its employees paid vacations, and the funds for that compensation come from the Bank's general assets, the Bank's policy falls squarely within the scope of the regulation.

If such practices are held to constitute an ERISA plan, then employers who agree to provide their employees paid vacations in the normal course of business out of their general assets will have to comply with the complex statutory requirements of ERISA. At the same time, preemption would leave employees with virtually no effective remedy against employers who do not make promised vacation payments because state wage

payment laws, including the weapon of criminal sanctions, will no longer be available.

II. Even if the Bank's agreement constitutes an ERISA plan, the Massachusetts statute must both "relate to" and "purport to regulate" that plan for the statute to be preempted. 29 U.S.C. §1144(a) and (c). In this case, the statute does neither. As this Court has recognized, some state actions may affect plans in too "tenuous, remote, or peripheral" a manner to "relate to" plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983). The Massachusetts statute does not affect the plan's administration or disclosure, funding or reporting requirements. It simply punishes employers for improperly withholding wages.

Nor does the Massachusetts statute "purport to regulate" the terms and

conditions of any plan. It does not contain any requirements, interpret any plan, or allow Massachusetts to issue orders. It cannot be said to "enforce" a plan because a successful prosecution of an employer does not result in the payment of any funds due to an employee. The Massachusetts statute neither "relates to" nor "purports to regulate" any ERISA plan and, consequently, the statute is not preempted.

III. ERISA's preemption provision does not apply to a state's "generally applicable criminal laws." 29 U.S.C. 1144(b)(4). The Massachusetts statute applies to every person who employs another person. It is not aimed at plans; it addresses the payment of wages generally. Accordingly, the Massachusetts statute, it is a generally applicable criminal law and hence exempt from ERISA's preemption provision.

ARGUMENT

I. BECAUSE ERISA PREEMPTS ONLY PLANS, AND THE BANK'S AGREEMENT TO MAKE CERTAIN VACATION PAYMENTS IS NOT AN ERISA EMPLOYEE BENEFIT PLAN, THE MASSACHUSETTS NONPAYMENT OF WAGES STATUTE IS NOT PREEMPTED BY ERISA IN THIS CASE.

A. Congress Did Not Intend That ERISA Preempt Traditional Areas Of State Regulation Such As The Massachusetts Nonpayment of Wages Statute.

ERISA "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). One section of ERISA preempts, with certain exceptions discussed below, state laws insofar as they relate to and purport to regulate any employee benefit plan as the latter term is defined in the statute. 29 U.S.C. §1144(a). The question posed in this case is whether a

Massachusetts statute that makes nonpayment of wages a crime, Mass. Gen. L. ch. 149, §148 (1986), is preempted by section 1144.

In any preemption analysis, this Court must begin "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1353 (1988) (citations omitted). "This assumption provides assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the court." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citations omitted). When determining whether ERISA preempts a state law, it is presumed "that Congress

did not intend to preempt areas of traditional state regulation." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985). "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state." DeCanas v. Bica, 424 U.S. 351, 357 (1976). Child labor laws, workmen's compensation laws, and wage laws are only a few examples of such protective state legislation. Id.

The Massachusetts statute's historical development makes it clear that Massachusetts has traditionally exercised its police powers in this area. In 1879, Massachusetts enacted the original version of Mass. Gen. L. ch. 149, §148, which governed wage payments made by cities. St. 1879, ch. 128; see

American Mut. Liab. Ins. Co. v. Comm'r of Labor & Indus., 340 Mass. 144, 146-147, 163 N.E.2d 19, 20-21 (1959) (discussing the history of the statute). In 1886, the statute was amended to require corporations to pay their employees on a weekly basis. St. 1886, ch. 87; American Mut., 340 Mass. at 146, 163 N.E.2d at 20. In 1895, individuals and partnerships became bound by the statute. St. 1895, ch. 438; American Mut., 340 Mass. at 146, 163 N.E.2d at 20-21.

In 1932, the statute was amended to impose criminal liability on corporate officers for a corporation's failure to pay wages. St. 1932, ch. 101, §1. In 1966, the definition of wages was inserted, making it clear that "wages" included holiday or vacation payments. St. 1966, ch. 319. Thus, the statute

clearly was not "hastily drawn" in any attempt indirectly to regulate ERISA plans. Cf. Shaw, 463 U.S. at 99-100 n.20 (quoting remarks of Sen. Javits).

Moreover, the Massachusetts statute is similar to statutes in numerous other states. Indeed, 48 states and the District of Columbia have statutes governing wage payments to employees, and over half of those laws specifically apply to vacation pay either through explicit mention in the statute or by judicial interpretation. See Petition for a Writ of Certiorari, Appendix B. Virtually all of the state statutes governing wage payments to employees were first passed before the enactment of ERISA. See Petition for a Writ of Certiorari, Appendix B.

Accordingly, the imposition by the states of criminal penalties for failure

to pay wages was indisputably well established when Congress enacted ERISA. In light of this prior and widespread exercise of state police powers, Congress must be presumed not to have intended to preempt state regulation in this area.

B. The Bank's Agreement To Make Certain Vacation Payments Does Not Constitute An ERISA Plan.

The Bank's agreement to pay employees for unused vacation time is not a plan. Hence, the Massachusetts statute that makes nonpayment of wages a crime is not preempted by ERISA.

The term "employee benefit plan," as defined in ERISA, encompasses both "pension" plans and "welfare" plans. 29 U.S.C. 1002(3) (1982). An "employee welfare benefit plan" is a

> plan, fund, or program . . . established or maintained . . . for the purpose of providing for its participants or their beneficiaries . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.

29 U.S.C. 1002(1) (emphasis added). In adopting ERISA, Congress was primarily concerned with remedying abuses in retirement and other benefit plans. See 29 U.S.C. §1001 (1982); S. Rep. No. 127, 93rd Cong., 1st Sess. 7, reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4840-4844, and in 1 Legislative History of the Employee Retirement Income Security Act of 1974 (hereinafter "Leg. Hist.") at 587, 589-93 (1976). In construing ERISA, this Court should "look to the provisions of the whole law, and to its object and policy." Pilot Life

Ins. Co. v. Dedeaux, 107 S. Ct. 1549, 1555 (1987), quoting, Kelly v. Robinson, 479 U.S. 36, 43 (1986).

ERISA contains an array of requirements for providers of employee benefit plans. Every employee benefit plan must be in writing, and administered by fiduciaries. 29 U.S.C. §1102(a) (1982). All plans must have procedures for funding, plan operation, and methods of payment. 29 U.S.C. §1102(b) (1982). All assets of a plan, with certain exceptions, must be held in trust. 29 U.S.C. §1103 (1982). ERISA also imposes certain reporting and disclosure requirements and establishes fiduciary duties for plan managers. See 29 U.S.C.A. §§1021-1031, 1104-1113 (West 1985 and Supp. 1988). These complex requirements, however, only apply to employee benefit plans, because "ERISA's

pre-emption provision does not refer to state laws relating to 'employee benefits' but to state laws relating to 'employee benefit plans.'" Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211, 2215 (1987) (emphasis in original).

Morash might argue that simply because the Bank made "oral and/or written agreements . . . from handbooks, manuals, memoranda and practices . . ." to pay employees out of its general assets for unused vacation time, the Bank's agreement is an employee welfare benefit plan under ERISA.[3/]

3/ While Morash contends that the Bank's agreement is an ERISA plan, Morash does not claim that the Bank complied with ERISA's reporting, disclosure, and fiduciary requirements prior to raising the preemption defense. It is ironic that Morash now seeks to use ERISA as a shield from state law liability when, prior to the filing of these criminal

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J.A. 19-20. Such an interpretation, however, would thwart Congressional intent. This Court has recognized that Congress intended the ERISA preemption provision to afford employers the advantages of being governed by a single set of procedures and regulations. Fort Halifax, 107 S. Ct. at 2217. "This concern only arises, however, with

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(footnote continued)

complaints, neither the Bank nor Morash apparently believed that an ERISA plan had been created. Cf. Taggart Corp. v. Life & Health Benefits Admin., Inc., 617 F.2d 1208, 1211-1212 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) (no ERISA plan where employer never made any attempt to comply with ERISA's numerous requirements); Golden Bear Family Restaurants v. Murray, 144 Ill. App.3d 616, 621-623, 494 N.E.2d 581, 585-587 (1986) (no ERISA plan where requirements of ERISA not followed); but see Gilbert v. Burlington Industries, Inc., 765 F.2d 320, 323-325, 328, sum. aff'd, 477 U.S. 901 (1986) (employer not estopped from raising defense of preemption even though it did not comply with requirements of ERISA).

respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to plans, rather than simply to benefits." Id. (emphasis in original).

The Bank policy at issue here does not, by nature, have the characteristics of a plan. No administrative scheme beyond routine recordkeeping or bookkeeping procedures is necessarily required, nor does the Bank necessarily assume the responsibility of paying benefits on a regular basis. Cf. Fort Halifax, 107 S. Ct. at 2218. Those employees who use all of their paid vacations while still in the Bank's employ presumably are paid in the normal course of business, just as they are paid their wages on a regular basis. Nothing

is owed to such employees when their employment is terminated.

Morash does not claim that the Bank assumes different responsibilities for employees, such as the complainants, who do not use all of their vacation time prior to termination. For such employees, the Bank presumably simply computes the number of unused vacation days (just as it totals the number of hours or days worked in calculating other wages) and pays the employees. Finally, and perhaps most importantly, all payments come from the Bank's general assets. J.A. 20. As this Court has aptly stated, "[t]o do little more than write a check hardly constitutes the operation of a benefit plan." Fort Halifax, 107 S. Ct. at 2218.

C. The Department Of Labor's Regulation Confirms That The Bank's Agreement To Make Vacation Payments Is A "Payroll Practice" And Not An ERISA Plan.

The Department of Labor's regulation buttresses the conclusion that the Bank's agreement in this case to pay employees for unused vacation time is not an ERISA welfare benefit plan. The Secretary of Labor is expressly authorized "to prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter [ERISA]. Among other things, such regulations may define accounting, technical and trade terms used in such provisions...." 29 U.S.C. §1135 (1982). "Because Congress explicitly delegated authority to construe the statute by regulation, . . . [this Court] . . . must give the regulations legislative and hence

controlling weight unless they are arbitrary, capricious or plainly contrary to the statute." United States v. Morton, 467 U.S. 822, 834 (1984). Insofar as "vacation benefits" are undefined in the statute and the Secretary of Labor was given the authority to prescribe standards, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-844 (1984).[4/]

Pursuant to this authority, the Secretary of Labor promulgated regulations defining ERISA coverage. Among other things, the Secretary of Labor determined that certain "payroll

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4/ Indeed, Morash has not questioned the validity of the regulation.

practices" were not an ERISA plan. 29 C.F.R. 2510.3-1 (1987). Included in these "payroll practices" were "[p]ayment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons," out of an employer's general assets. 29 C.F.R. §2510.3-1(b)(3) (1987). This regulation is entitled to particular weight because it was formulated by the agency charged with administering ERISA, and the regulation was created contemporaneously with the passage of the statute.[5/]

5/ On December 4, 1974, soon after ERISA became law, the Secretary of Labor announced that he would issue regulations to make clear that certain employer practices, such as vacation pay, would

(footnote continued)

See Watt v. Alaska, 451 U.S. 259, 272-73 (1981); see also Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 262 (1985) (interpretation of agency charged with administration of statute entitled to substantial deference).[6/]

(footnote continued)

not be subject to the Act. 39 Fed. Reg. 42,236 (December 4, 1974). The Secretary of Labor subsequently concluded that "payroll practices" such as paid vacations were beyond the scope of ERISA "because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for these reforms in Title I [of ERISA] were not in this area and there is no indication that Congress intended to subject these practices to Title I coverage." 40 Fed. Reg. 24,642-24,643 (June 9, 1975).

6/ The Department of Labor, in several opinion letters, has expounded upon 29 C.F.R. §2510.3-1. The Department has explained that once vacation payments are placed into separate funds or into separate accounts with restrictions on removal, the payments are not "payroll

(footnote continued)

The Massachusetts Supreme Judicial Court, in its opinion below, acknowledged the existence of the Department of Labor regulation, but misperceived its meaning. The court held that the regulation applies only to an employer's payment of compensation out of general assets to an employee "while he or she is on vacation, ... [and] does not apply to the present case which involves a lump-sum payment for unused vacation time upon discharge." Commonwealth v. Morash, 402 Mass. at 290-291, 522 N.E.2d at 412 (emphasis in original; citations omitted). This characterization of the

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(footnote continued)

practices" but rather vacation benefit plans subject to ERISA. See, e.g., Department of Labor ERISA Opinion Letter No. 77-84A (Nov. 7, 1977); Department of Labor ERISA Opinion Letter No. 81-55A (June 26, 1981). Here, of course, Morash has stipulated that payments are made from the Bank's general assets. J.A. 20.

Department of Labor's regulation is inconsistent with both its purpose and content.

The fundamental distinction drawn by the Department of Labor's regulation is between vacation pay on the one hand and severance pay on the other. The Supreme Judicial Court apparently concluded that simply because the payments to the complainants were due after their employment terminated, the payments were more akin to severance pay than to ordinary wages and therefore the Department of Labor regulation does not apply. Morash, 402 Mass. at 291, 522 N.E.2d at 412. This analysis is unpersuasive. The vacation pay owed by the Bank is neither contingent upon, nor intended to compensate for, termination

of employment.[7/] Hence, vacation pay is quite different from the severance pay at issue in Holland v. Burlington Industries, Inc., 772 F.2d 1140 (4th Cir. 1985), sum. aff'd, 477 U.S. 901 (1986) and Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2d Cir. 1985), sum. aff'd, 477 U.S. 901 (1986).[8/]

7/ The Bank's policy is simple. It has agreed to give its employees paid vacations. J.A. 19. The money for these vacations comes out of the Bank's general assets. J.A. 20; Cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 4-5 (1983). On its face, this arrangement is no different from the procedure for paying employees their weekly wages.

8/ Severance pay and vacation pay are logically distinct. See, e.g., M. Miller, Comprehensive GAAP (Generally Accepted Accounting Principles) Guide 1988 §§8.16-8.19 (1987). Accrued vacation pay is payable whether an employee quits, is fired, retires or dies. See Evans v. Unemployment Ins. Appeals Bd., 39 Cal.3d 398, 414-415, 216 Cal. Rptr. 782, 790, 703 P.2d 122, 130 (1985) (en banc). "A vacation with pay is in effect additional wages." In Re

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Furthermore the Supreme Judicial Court's

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Wil-Low Cafeterias, 111 F.2d 429, 432 (2d Cir. 1940). In contrast, severance pay is defined as "[p]ayment by an employer to employee beyond his wages on termination of his employment. Generally, it is paid when the termination is not due to employee's fault...." Black's Law Dictionary 1232 (5th ed. 1979); see, e.g., Gilbert v. Burlington Industries, 765 F.2d at 325 ("severance pay is an unemployment benefit"). Since vacation pay is no more than deferred income, for accounting purposes it is treated very differently than severance pay, which requires an extra outlay of funds above and beyond ordinary wages. M. Miller, Comprehensive GAAP (Generally Accepted Accounting Principles) Guide §§8.16-8.19; Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702, 1720 (1987). Moreover, the amount of money associated with severance pay is likely to be much larger than that involved in vacation pay because the former accumulates every year the employee is with the employer. 87 Colum. L. Rev. at 1720. "Because of the large sums of money involved and the length of time the employer will hold the money for the employee, problems of fraud and misuse of funds are likely to occur regardless of the employer's source of funds." Id. Significantly, the Department of Labor does not classify severance pay as a "payroll practice." 29 C.F.R. §2510.3-1(b) (1987).

reasoning leads to the anomalous result that an employer who regularly pays employees for unused vacation time just prior to their discharge would not create an ERISA plan, while another employer who failed to make such payments but held vacation pay until after employment was terminated would create an ERISA plan.

The carryover provision in the Bank's vacation policy is obviously designed to permit the Bank to have its employees defer their vacations without forfeiting their vacation pay. This type of option cannot be said to transform the Bank's vacation policy into an ERISA plan or to take the plan out of the reach of 29 C.F.R. §2510.3-1(b). The regulation permits employers to provide paid vacations and induce employees to take vacations at certain times without

creating an ERISA plan. The Bank here agreed to provide paid vacations and promised its employees payment in lieu of unused vacation time. This is exactly what the Department of Labor determined is a "payroll practice." As long as a vacation policy is primarily designed to provide regular paychecks to employees who are on vacation and is funded from an employer's general assets, it falls within the exclusion defined in 29 C.F.R. §2510.3.

Nor does Department of Labor's regulation deprive the term "vacation benefits" of meaning. For example, funding vacations by any means other than out of an employer's general assets is not a payroll practice and therefore is a plan under ERISA. Mackey v. Lanier Collections Agency & Service, 108 S. Ct. 2182, 2184 (1988); Franchise Tax Bd. v.

Construction Laborers Vacation Trust, 463 U.S. 1, 4-5 (1983). In Mackey, the petitioners were trustees of a plan that provided vacation and holiday benefits to eligible employees in several states. Mackey, 108 S. Ct. at 2184. There was no question that the scheme at issue was a plan. Likewise, in Franchise Tax Board, the vacation benefits plan was "set up in large part because union members typically work for several employers during the course of a year." Franchise Tax Bd., 463 U.S. at 4 n.2. Again, this arrangement was clearly an ERISA plan and, indeed, an example of a true vacation benefit plan, the type ERISA was meant to govern.

The Department of Labor has made a similar distinction for an arrangement whereby employees entered into an irrevocable agreement under which

vacation wages could be deferred for payment in annual installments, with interest, after severance. Department of Labor ERISA Opinion Letter No. 81-55A (June 26, 1981). The differences between that plan and the agreement in this case are obvious. Here, there is no irrevocable agreement to defer payment beyond the date of termination, no interest payments, and no intent that vacation pay function as severance pay. Thus, the Department of Labor created a sensible distinction between "payroll practices" and "plans."

D. The Legislative History And Policies Underlying ERISA Clearly Demonstrate That The Bank's Agreement Is Not An ERISA Plan.

ERISA's legislative history is silent with regard to whether Congress intended to preempt state regulation of vacation

pay. See Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702, 1708-1711 (1987). Congress, in adopting ERISA, was primarily concerned with regulating private pension plans and correcting the abuses associated with such plans. See, e.g., 120 Cong. Record 29,933-29,934 (Aug. 22, 1974) (statement of Sen. Javits), reprinted in 3 Leg. Hist. at 4747-4751; 120 Cong. Record 29,944-29,947 (Aug. 22, 1974) (statement of Sen. Humphrey), reprinted in 3 Leg. Hist. 4776-4777; 119 Cong. Record 30,003 (Sept. 18, 1973) (statement of Sen. Williams), reprinted in 2 Leg. Hist. 1598-1600; California Hosp. Ass'n v. Henning, 770 F.2d 856, 859 (9th Cir. 1985), cert. denied, 477 U.S. 904 (1986). Because the focus was on pension plans, there was no discussion of the effect of preemption on

vacation payments. 87 Colum. L. Rev. at 1710. Indeed, as one commentator has noted, "[t]he purpose of the legislation was to increase protection to employees; a provision to lessen protection would have received more comment." Id. Moreover, Congress must have been aware that vacation benefit plans or funds had historically been the practice in certain industries, such as construction and longshoring, where employees often work for several employers during the course of a year. Franchise Tax Bd., 463 U.S. at 4. It was these types of plans that Congress intended to control because these plans were potential targets for abuse and mismanagement.

Although, as noted, the legislative history of ERISA is silent as to the meaning of vacation benefit plans, it is clear that Congress was concerned with

providing greater protection to employees and their beneficiaries. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981). By ruling that the Bank's agreement is not an ERISA plan, this Court would further that Congressional goal.

Most full-time employees in the United States receive paid vacations. United States Chamber of Commerce, Employee Benefits 1986 at 21 (1987) (86 percent of employees in the United States offered payments for or in lieu of vacation in 1986). Often, employees defer taking of some or all of their vacations, and vacation pay, during the course of their employment. This arrangement may benefit employers, who do not have to do without a vacationing employee, and employees, who receive payment for unused vacation time.

A determination that an agreement such as the Bank's constitutes an ERISA plan would impose the complex statutory requirements of ERISA on employers, large or small, who ask or agree to have an employee defer his or her vacation. As this Court recognized in Fort Halifax, preemption was designed to give employers the advantage of a uniform set of administrative procedures, but only with respect to benefits whose provision by nature require an ongoing administrative program. Fort Halifax, 107 S. Ct. at 2217. A ruling that the Bank's policy is an ERISA plan will have the effect of increasing the employer's burden with no comparable benefit to the employees.

If routine vacations with pay are ERISA plans, any employee claiming a denial of vacation pay could sue his or

her employer in federal court. 29 U.S.C. §1132(a). The federal courts could well be faced with the "substantial and needless burden," Henning, 770 F.2d at 861, of having "a host of trivial cases [brought] into the federal courts." Nat. Metalcrafters Div. of Keystone v. McNeil, 784 F.2d 817, 823 (7th Cir. 1986).

At the same time, if arrangements such as the Bank's are deemed plans, employees will be left with virtually no swift and effective remedy against employers who refuse to honor agreements. The vast majority of complaints regarding vacation pay do not arise until the conclusion of the employment relationship; an employee who defers his vacation usually will not seek compensation for the unused time until there is no longer an opportunity to use

it. See, e.g., Shea v. Wells Fargo Armored Service Corp., 810 F.2d 372, 374, 378 (2d Cir. 1987) (former employees' claims for vacation pay brought after termination). If vacation deferment policies such as the Bank's are ERISA plans, employees will not be able to rely on state wage payment laws for assistance. The potent and cost-effective weapon of criminal sanctions will no longer be available for the individual employee. Such employees will be virtually without any practical recourse. Employees situated as the complainants are here would actually be less protected than they would have been if ERISA had never been enacted; this is hardly the result that Congress intended. 87 Colum. L. Rev. at 1715.

II. EVEN IF THE BANK'S AGREEMENT TO PAY EMPLOYEES FOR UNUSED VACATION TIME CONSTITUTES AN ERISA PLAN, THE MASSACHUSETTS STATUTE IS NOT PREEMPTED BY ERISA BECAUSE IT DOES NOT "RELATE TO" ANY PLAN NOR "PURPORT TO REGULATE" ERISA PLANS.

A. A State Law Must Both "Relate To" An ERISA Plan And "Purport To Regulate" ERISA Plans Before It Can Be Held To Be Preempted.

As the Court of Appeals for the Ninth Circuit has observed, "The structure of [29 U.S.C. §1144] is somewhat unusual." Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349, 1359 n.20 (9th Cir.), mod. 791 F.2d 799 (9th Cir., cert. denied, 479 U.S. 949, 1018 (1986). Section 1144(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Section 1144(c)(1) defines "State law," so far as here pertinent, as the "laws . . . of any

State." Section 1144(c)(2), in turn, defines "State" as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans. . . ." The foregoing provisions, when read in concert, require that a state law must both "relate to" an ERISA plan and "purport to regulate" ERISA plans before it can be held to be preempted by the federal scheme. Martori Bros. Distributors v. James-Massengale, 781 F.2d at 1359; Rebaldo v. Cuomo, 749 F.2d 133, 137 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985); Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984). Cf. Alessi v. Raybestos- Manhattan, Inc., 451 U.S. 504, 525 (1981) (phrase "directly or

indirectly" modifies both "State" and "agency or instrumentality").[9/]

B. The Massachusetts Statute Does Not "Relate To" An ERISA Plan.

This Court has stated that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Addressing the latter option first, it is apparent that the Massachusetts statute makes no mention whatsoever of any ERISA plan

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9/ Moreover, where the challenged state provision is "an exercise of a State's police powers, which should not be superseded by federal regulations unless that was the clear intent of Congress[,] [citations omitted] [the state law] should not be found to 'relate' to 'the terms and conditions of employee benefit plans' unless this conclusion is unavoidable." Rebaldo v. Cuomo, 749 F.2d at 138 (citation omitted; emphasis added).

(indeed, as discussed above, the statute was first enacted nearly a hundred years before the passage of ERISA). The statute thus cannot be said to have been "specifically designed to affect employee benefit plans" and it certainly does not "single ERISA plans out" for any "special treatment." Cf. Mackey v. Lanier Collections Agency & Service, 108 S. Ct. 2182, 2185, 2189 n.12 (1988) (specific Georgia statute barring garnishment of ERISA plan funds preempted; general state garnishment law not preempted). Hence, the Massachusetts statute does not make "reference to" an ERISA plan.

Nor can it be demonstrated that the Massachusetts statute has a "connection with" an ERISA plan within the meaning of Shaw. While the phrase "connection with" is admittedly broad, this Court has

recognized that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n.21. The Massachusetts statute does not affect the administration of any plan. Mass. Gen. L. ch. 149, §148 has nothing whatsoever to do with disclosure, funding or reporting requirements. Nor does it potentially subject a plan to multiple orders under varying or conflicting state laws. Cf. Mackey, 108 S. Ct. at 2192 (Kennedy, J., dissenting).[10/] As discussed above,

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10/ Indeed, the state statute by definition applies to employers, not plans or trustees or administrators of plans. Thus, holding an employer liable does not place any fiscal or administrative burden on a plan itself. Teper v. Park West Galleries, Inc., 431 Mich. 202, 215-16, 427 N.W.2d 535, 541 (1988) (damage award based on terms of

(footnote continued)

Mass. Gen. L. ch. 149, §148 simply makes it a crime for employers to improperly withhold workers' wages. It does not "relate to" an ERISA plan within the meaning of 29 U.S.C. §1144(a).

C. The Massachusetts Statute Does Not "Purport To Regulate" ERISA Plans.

As noted above, and as explained by the Court of Appeals for the Ninth Circuit:

> Congress further limited the preemptive effect of ERISA in the definitional section, 29 U.S.C. §1144(c)(2), wherein it is established that the term "State" for

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(footnote continued)

ERISA plan but not levied against plan or administrators too "peripheral" to trigger ERISA preemption; "it does not relate to a pension plan within the meaning of the ERISA"). As the Teper court held, "ERISA preemption... turns upon whether state law places any fiscal, administrative, or legal burdens upon the plan." Teper, 431 Mich. at 218, 427 N.W.2d at 542. Pursuit of a remedy against an employer does not create a fiscal, administrative, or legal burden upon a plan.

> preemption purposes includes a state or its political subdivisions or agencies of either, "which purports to regulate, directly or indirectly, the terms and conditions of employee benefits plans covered by this subchapter."

Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984). See Rebaldo v. Cuomo, 749 F.2d 133, 137 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985) ("purport to regulate" test imposes a limit on the reach of the preemption clause in ERISA). Cf. Teper v. Park West Galleries, Inc., 431 Mich. 202, 225, 427 N.W.2d 535, 546 (Riley, C.J., concurring) (plaintiff's jury award not preempted since it in no way "purports to regulate" any term or condition of a plan).

At the outset, it should be noted that because a challenged state provision must both "relate to" a plan and "purport to regulate" ERISA plans before it is preempted, if the Court determines that the Massachusetts statute does not

"relate to" any plan, it need not reach the "purport to regulate" question.[11/] Similarly, if the Court rules that the state law does not "purport to regulate" ERISA plans, it need not address the "relate to" question.

While this Court has on several occasions construed the "relate to" language in ERISA, it has never examined the "purport to regulate" requirement of the statute's preemption provision. The phrase itself is undefined in the

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11/ By the same token, "[a]s a logical matter, if a state law does not 'relate to' ERISA plans, it cannot 'purport to regulate' them, for 'relates' includes, but is much broader than, 'purports to regulate.'" Martori Bros. Distributors v. James-Massengale, 781 F.2d at 1359. In other words, if the state law does not 'relate to any employee benefit plan," a fortiori, it does not "purport to regulate" ERISA plans. Id.

statute. Consequently, guidance must be found elsewhere.[12/]

In Lane v. Goren, the Ninth Circuit stated that for a state provision to "purport to regulate" ERISA plans, "the state statute must atttempt to reach in one way or another the 'terms and conditions of employee benefit plans.'" 743 F.2d at 1339.[13/] The issue in Lane

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12/ Black's Law Dictionary defines "regulate" as "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." Black's Law Dictionary 1156 (5th ed. 1979). Applying that definition, it seems clear that the Massachusetts statute does not purport "to regulate" -- certainly not in the accepted sense of establishing or implementing systematic guidelines or controls in a general area of governmental concern.

13/ In a similar vein, several commentators have suggested that in analyzing whether a statute relates to and purports to regulate a plan, a court

(footnote continued)

was whether certain California statutes prohibiting employment discrimination were preempted by ERISA. The court held that preemption was not appropriate and analyzed the matter, with respect to the "purport to regulate" issue, as follows:

> We find that the state statutes in no way regulate the "terms and conditions" of an ERISA plan. We reach this conclusion without giving the phrase "terms and conditions" a narrow interpretation. ERISA imposes participation, funding, and vesting requirements on pension plans. . . . It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. . . . ERISA also provides for the fair and proper handling and disposition of benefit claims. . . . For purposes of this case we assume that the phrase "terms and conditions" of benefit plans encompasses all these areas. The California statutes in question in no way purport to reach any of them. They merely prohibit employers from discriminating against employees on the basis of age, race, sex, or religion.

743 F.2d at 1340 (citations omitted). Likewise, the Massachusetts statute does not purport to reach any "terms and conditions" of benefit plans; it merely punishes employers for unlawfully failing to pay wages.

In Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985), the Second Circuit rejected the contention that New York's promulgation of hospital rate schedules was preempted by ERISA. The court noted that "a state law must 'purport[] to regulate, . . .

(footnote continued)

should ask whether a state intended to regulate the terms and conditions of plans. See, e.g., W. Kilberg and P. Inman, Preemption of State Law Under ERISA: Drawing The Line Between Laws That Do and Laws That Do Not Relate To Employee Benefit Plans, 19 Forum 162, 172 (1983); Comment, ERISA Preemption of State Vacation Pay Laws: California Hospital Association v. Henning, 16 Loy. U. Chi. L. J. 387, 399 (1985).

the terms and conditions of employee benefit plans' to fall within the preemption provision[,]" 749 F.2d at 137, and ultimately held that "[w]here, as here, a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated." 749 F.2d at 139. The Massachusetts statute similarly "does not affect the structure, administration, or type of benefits provided by an ERISA plan."[14/]

14/ The Rebaldo court also made a separate, and more general, point which is worthy of note. The court stated that "[a] preemption provision designed to prevent state interference with federal

(footnote continued)

In its opinion below, the Supreme Judicial Court held that the criminal statute satisfied the "purport to regulate" requirement for preemption. 402 Mass. at 295, 522 N.E.2d at 414-415.[15/] The court concluded

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(footnote continued)

control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction." 749 F.2d at 138. It is submitted that while the preemption provision was designed to prevent state interference, the "purport to regulate" requirement works to assure that only those state provisions which might "interfere" are preempted. In this regard, it is significant that the Massachusetts statute in no way conflicts with any of the regulatory provisions of ERISA.

15/ The court relied heavily upon Cairy v. Superior Court, 192 Cal. App.3d 840, 843, 237 Cal. Rptr. 715 (1987). The status of the Cairy holding, however, is unclear since the California Supreme Court recently granted further review in a similar case. Carpenters Southern Cal. Admin. Corp. v. El Capitan Dev. Co., 197 Cal. App.3d 790, 243 Cal. Rptr. 132, 135-136, further rev. granted, 246 Cal. Rptr. 209, 753 P.2d 1 (1988).

that because "the power to regulate includes the power to enforce," the Massachusetts law regulated the Bank's plan. 402 Mass. at 295, 522 N.E.2d at 414-415 (citation omitted). However, the court's conclusion is erroneous on a number of grounds. First, and perhaps foremost, this conclusion ignores the fact that the statute does not enforce agreements; it merely punishes individuals who do not make payments. A successful prosecution of an employer does not result in the payment of any funds due to an employee. The employer is punished, but the agreement (or plan) is not "enforced."

Moreover, the Supreme Judicial Court's analysis ignores the criteria for "purporting to regulate" as they are suggested by the authorities discussed herein. To reiterate and conclude, the

Massachusetts statute is silent as to the terms and conditions of vacation plans. It does not contain or address any disclosure, funding or reporting requirements. Nor does it affect the structure, administration, or type of benefits provided by any plan. In enforcing the statute, Massachusetts does not interpret plans, nor can it issue orders regulating plans. The only function conferred by the statute is the prosecution of an employer for not paying wages owed to an employee. The statute simply does not "purport to regulate" ERISA plans, and, accordingly, preemption is inappropriate.

III. THE MASSACHUSETTS STATUTE IS NOT PREEMPTED BY ERISA BECAUSE THE STATE PROVISION IS A "GENERALLY APPLICABLE CRIMINAL LAW."

Section 1144(b)(4) of ERISA provides that the preemption clause, section

1144(a), shall not apply to "any generally applicable criminal law of a State." 29 U.S.C. §1144(b)(4). Petitioner submits that the Massachusetts nonpayment of wages statute is a "generally applicable criminal law" within the meaning of ERISA, and, accordingly, the state law should not be preempted.

The term "generally applicable criminal law" is not defined in ERISA, nor has it ever been construed by this Court.[16/] The lower courts which have undertaken to construe the phrase have

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16/ However, in New York Telephone Co. v. New York Labor Dept., 440 U.S. 519, 533 (1979), a plurality of this Court ruled that a New York statute which authorized the payment of unemployment benefits to striking workers was "a law of general applicability," and not one "regulating the relations between employees, their union, and their employer." Accordingly, the Court held, the state provision was not preempted by the National Labor Relations Act or the Social Security Act.

typically done so with little exposition or analysis, and no uniform standard for the inquiry has been developed.[17/]

17/ See, e.g., Upholsterer's Internat. Union v. Pontiac Furniture, 647 F. Supp. 1053, 1056-1057 (C.D. Ill. 1986) (Illinois Wage Payment and Collection Act not preempted); Goldstein v. Mangano, 99 Misc.2d 523, 531-532, 417 N.Y.S.2d 368, 373-375 (1978) (criminal wage law not preempted); Sasso v. Vachris, 116 Misc.2d 797, 799-802, 456 N.Y.S.2d 629, 632-633 (1982), mod. on other grounds, 106 A.D.2d 132, 482 N.Y.S.2d 875 (1984), rev. on other grounds 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985) (New York criminal wage statute not preempted); People v. Art Steel Co., Inc., 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986) (New York wage statute is preempted); Commonwealth v. Federico, 383 Mass. 485, 490-491, 419 N.E.2d 1374, 1378 (1981) (Massachusetts statute aimed specifically at employee benefit plans is preempted); Sforza v. Kenco Constructional Contracting, Inc., 674 F.Supp. 1493, 1494-1496 (D.Conn. 1986) (criminal statute for failure to contribute to health and welfare plans is preempted); State v. Burten, 219 N.J. Super. 339, 348-51, 530 A.2d 363, 368-370 (1986), aff'd, 219 N.J.Super 156, 530 A.2d 30 (1987) (New Jersey criminal statute requiring contributions to pension plans is preempted).

The question whether a state provision is a "generally applicable criminal law" presents little difficulty in what might be termed extreme cases. That is, there can be no doubt that criminal laws against larceny and embezzlement, for example, are generally applicable criminal laws. E.g., Commonwealth v. Federico, 383 Mass. 485, 490, 449 N.E.2d 1374, 1377 (1981). By the same token, it seems clear that a statute which facially and specifically applies to employee benefit plans, or pension plans, is not a generally applicable criminal law within the meaning of 29 U.S.C. §1144(b)(4). Id. Between these extremes, however, there is no consensus, in part, no doubt, because of the absence of any prevailing standard controlling the inquiry.

Any standard to be crafted and applied in this area must take into account, on the one hand, that Congress did not intend to preempt areas of traditional state regulation, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985); that the states have broad police powers, including the power to protect employees through wage laws, DeCanas v. Bica, 424 U.S. 351, 356 (1976); and that the exercise of federal supremacy is not to be lightly presumed. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); see L. Tribe, American Constitutional Law 499-500 (2d ed. 1988). Any such "test" must also reflect, on the other hand, that Congress intended through the ERISA preemption provision to prevent state interference with federal regulation in the area.

Petitioner submits that the following proposed mode of analysis balances the foregoing considerations. A statute is a "generally applicable criminal law" within the meaning of §1144(b)(4) if (a) it applies to a broad or general class of prospective defendants, and (b) the nature of the conduct or subject matter which it addresses is sufficiently general to negate concern that use of the statute will necessarily interfere with federal regulation of ERISA plans.

Some lower courts have previously focused on the generality of the class issue. Two New York courts, for example, have held that "[a] generally applicable criminal law is one which extends to the entire state and embraces all persons or things of a particular class" and, therefore, a New York statute which makes it a crime to fail to make certain

payments to employees is a generally applicable criminal law. Sasso v. Vacharis, 116 Misc.2d 797, 800-801, 456 N.Y.S.2d 629, 632 (1982); Goldstein v. Mangano, 99 Misc. 523, 531-532, 417 N.Y.S.2d 368 (1978).

The Massachusetts statute applies to "[e]very person having employees in his service . . ." Mass. Gen. L. ch. 149, §148 (emphasis added). Every employer in Massachusetts, from a sole proprietor with one employee to the president of a multinational corporation, is bound by the statute. The statute is thus "generally applicable" at least with respect to the scope of the class of prospective defendants subject to its provisions.

Moreover, the nature of the conduct or subject matter which the statute addresses (nonpayment of wages) is

sufficiently general to negate concern that use of the statute would necessarily interfere with federal regulation of ERISA plans. The statute is not "aimed at" employee benefit plans; it addresses wages, not ERISA plans.

In its opinion below, the Supreme Judicial Court, while acknowledging that the statute was not aimed specifically at employee benefit plans, held that it was not within the exception for generally applicable criminal laws. 402 Mass. at 296-297, 522 N.E.2d at 415-416. The court concluded that "[b]ecause our statute is limited to the nonpayment of 'wages' by an employer to an employee, including agreed-upon vacation payments which will often be funded from 'employee benefit plans,' prosecution under the statute is not saved from preemption by the exception for 'generally applicable

criminal laws.'" 402 Mass. at 297, 522 N.E.2d at 416.

The court's analysis is fundamentally and demonstrably flawed. The dispositive question cannot be whether a particular statute might be applied in a factual context which implicates employee benefit plans. If that were the critical inquiry, a general larceny statute would not be a generally applicable criminal law, because it might well be employed to prosecute theft from plans. This is hardly what Congress intended nor what the courts have held.

The issue, thus, must not be the potential "reach" of a statute into the ERISA domain. Rather, the proper inquiry is addressed to the nature of the statute as dictated by its terms. The issue, in effect, reduces to a single question: Is this statute so facially specific that it represents such a necessary threat to

ERISA regulation that it can be said with confidence that Congress intended that it be preempted? The answer, with respect to the Massachusetts nonpayment of wages law, is "no." The provision is a "generally applicable criminal law" within the meaning of ERISA, and as a consequence, it must not be preempted.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Judicial Court should be reversed.

Respectfully submitted,

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